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# Public Housing Authority's Use of Exculpatory Clause in Lease Agreement Is Not Contrary to Public Policy.

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infinite liability, it is submitted that the balance is shifted in favor of compensating bystanders who qualify under general tort principles.

The facts presented in *Whetham v. Bismarck Hospital*[64] demonstrate, as clearly as any could, the arbitrary nature of the zone of danger rule just as the case of the grandmother who was not hit by the bull[65] demonstrates this under the impact rule. Here the plaintiff was in the zone of emotional risk, but not the zone of physical peril. The risk of emotional injury to the plaintiff was great and her presence was actually in the mind of the employee who was bringing the baby to her. Clearly under a general negligence rule she should have been granted an opportunity to prove her injuries. The statement that "[t]he Mephistophelian power of a rigid rule or talismanic phrase to hold analysis in fetters is often encountered in tort law"[66] has once more been verified.

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LANDLORD-TENANT—EXCULPATORY CLAUSES—PUBLIC HOUSING AUTHORITY'S USE OF EXCULPATORY CLAUSE IN LEASE AGREEMENT IS NOT CONTRARY TO PUBLIC POLICY. *Crowell v. Housing Authority*, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted).

Appellants, as heirs, brought this suit against the public housing authority under the Survival Statute, article 5525, Texas Revised Civil Statutes Annotated, contending their father, Arbe J. Crowell, died as the result of carbon monoxide poisoning from a defective gas heater in the apartment leased to him by appellee. The appellants contend the trial court erred in granting appellee's motion for summary judgment, thereby giving effect to an exculpatory clause providing for the appellee's non-liability for any injuries to the tenant from any cause whatever.[1] Appellants base their argument on the theory that the clause represents an attempt by the Dallas Housing Authority to avoid its statutorily imposed duties to a class of persons it was created to serve, and to allow the Authority to do so would be against the public policy of this State.[2] The appellee argues that the

64 197 N.W.2d 678 (N.D. 1972).

65 Bosley v. Andrews, 142 A.2d 263 (Pa. 1958).

66 Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584, 584 (1961).

1 The exculpatory lease provides: ". . . nor shall the Landlord nor any of its representatives or employees be liable for any damage to person or property of the Tenant, his family or his visitors, which might result from the condition of these or other premises of the Landlord, from theft or from any cause whatever." Crowell v. Housing Authority, 483 S.W.2d 846, 865 (Tex. Civ. App.—Tyler 1972, writ granted).

2 "To sue and to be sued . . . to carry into effect the powers and purposes of the authority." TEX. REV. STAT. ANN. art. 1269k, § 8(a) (1963).

duties of a landlord to his tenants may be modified by a contract that represents the mutual intent of the parties. The housing authority rejects the contention that such a clause is contrary to the public policy.[3] Held—*Affirmed.* Exculpatory clauses used by a public housing authority in lease agreements are not contrary to the public policy.

The courts of this state have followed the majority rule that "[c]ontracts written or construed so as to allow indemnity for liability arising out of the indemnitee's own negligence are not violative of the public policy."[4] However, this rule is subject to exceptions as recognized in *Spence & Howe Construction Co. v. Gulf Oil Co.*,[5] which stated: "Of course, certain types of indemnity agreements may be contrary to public policy for various other reasons . . . ."[6]

Public policy has always been a major factor in determining the validity of exculpatory clauses used in contracts.[7] Legislative enactments have determined public policy and court decisions have supported it. The meaning of the phrase is vague and variable, however, and has been left free from any fixed rules and definitions.[8] Public policy has been categorized as being for the protection of the public or

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. . . to investigate into living, dwelling, and housing conditions and into the means and methods of improving such conditions; to determine where slum areas exist or where there is a shortage of decent, *safe*, and sanitary dwelling accommodations for persons of low income . . . .

*Id.* § 8(f) (emphasis added).

It is hereby declared to be the policy of this State that each housing authority shall manage and operate its housing projects in an efficient manner . . . consistent with its providing decent, *safe*, and sanitary dwelling accommodations . . . . *Id.* § 9 (emphasis added).

*See also* 42 U.S.C. § 1401 (1970).

3 Crowell v. Housing Authority, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted).

4 Fenn v. Burnett, 405 S.W.2d 161, 164 (Tex. Civ. App.—Fort Worth 1966, no writ); *accord*, Mitchell's, Inc. v. Friedman, 157 Tex. 424, 430, 303 S.W.2d 775, 779 (1957). The Texas Supreme Court stated:

An obligation to hold harmless from claims, liability or damage resulting from a specified operation or instrumentality will be enforced in accordance with its terms even though the indemnitee may thereby be relieved of the consequences of his own negligence.

*See* 17 AM. JUR. 2d *Contracts* § 188 (1964). "It is not the rule that any agreement by any person which assumes to place another person at the mercy of his own faulty conduct is void as against public policy."

5 365 S.W.2d 631 (Tex. Sup. 1963).

6 *Id.* at 633. *See also* RESTATEMENT OF CONTRACTS §§ 572, 575 (Supp. 1965). Indemnity agreements have been held contrary to public policy in cases where the indemnitee is "dealing with the general public and whose business is affected with a public interest." Philippine Airlines, Inc. v. Texas Eng'r & Mfg. Co., 181 F.2d 923, 925 (5th Cir. 1950).

7 *See* Gilpin v. Abrahams, 218 F. Supp. 414 (E.D. Pa. 1963), *appeal dismissed*, 328 F.2d 884 (3d Cir. 1964); Nedow v. Nicholson, 381 S.W.2d 723, 724 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). The Texas court stated:

Ordinarily before a contract is found to be illegal it must be established that it contravenes public policy in that it is contrary to statutory law or is immoral in itself, and the injury to the public must be clearly apparent.

8 Kuzmiak v. Brookchester, 111 A.2d 425, 430 (N.J. Super. Ct. 1955).

public good, with the possible or probable effect of the agreement having primary importance.[9]

In Texas, courts have consistently refused to enforce exculpatory clauses as being contrary to public policy in cases "involving the negligence of common carriers, public utilities, parking lot operators, innkeepers, [municipalities] and others who are dealing with the general public and whose business is affected with a public interest . . . ."[10] The validity of exculpatory clauses in other situations has been considered differently in many jurisdictions due primarily to the conflict of two public policies—the obligation to be liable for one's negligence versus the right of freedom to contract.[11] These conflicting policies are also present in determining the validity of this type of clause when used in lease agreements.[12] The validity of an indemnity provision in a lease agreement between private parties was upheld by the Texas Supreme Court in *Mitchell's, Inc. v. Friedman.*[13]

It is now necessary to determine whether in the *Crowell* case this general rule should be expanded to include a "public" landlord-tenant lease agreement. In *Crowell,* the appellants argue that the general rule does not apply to their case and base their argument on the fact that the Dallas Housing Authority is not a private landlord but instead is an agency dealing with the public's interest.[14] Though no Texas authority was cited directly in point, the court did cite two other jurisdictions which reached conflicting conclusions.[15]

In *Housing Authority v. Morris,*[16] the Alabama Supreme Court held that the purpose of the statute which created the housing authority was to provide safe and sanitary housing for persons of low income and

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9 Uvalde Constr. Co. v. Shannon, 165 S.W.2d 512, 513 (Tex. Civ. App.—Eastland 1942, no writ); *see* 13 TEX. JUR. 2d *Contracts* § 171 (1960).

10 Philippine Airlines, Inc. v. Texas Eng'r & Mfg. Co., 181 F.2d 923, 925 (5th Cir. 1950); *see* Chicago & N.W. Ry. v. Davenport, 205 F.2d 589 (5th Cir. 1953), *cert. denied,* 346 U.S. 930 (1954); Lone Star Gas Co. v. Veal, 378 S.W.2d 89, 95 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.); Dittmar v. City of New Braunfels, 48 S.W. 1114 (Tex. Civ. App. 1899, no writ).

11 Simmons v. Columbus Venetian Stevens Bldgs., Inc., 155 N.E.2d 372, 379 (Ill. Ct. App. 1958). This court questions the distinction made between the protection of the public on common carriers from providing the public with a safe place to live and work. *Id.* at 384.

12 It is generally agreed that a landlord may by a contract with his tenant lawfully relieve himself from liability for any and all damages including liability for negligence. 49 AM. JUR. 2d *Landlord and Tenant* § 869 (1970); *accord,* Barclay Woolen Corp. v. W.E. Hulton Dyeing Co., 220 F. Supp. 598, 600 (E.D. Pa. 1963); Mitchell's, Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775 (1957). *But cf.* Manius v. Housing Authority, 39 A.2d 614 (Pa. 1944); Thomas v. Housing Authority, 426 P.2d 836 (Wash. 1967).

13 157 Tex. 424, 303 S.W.2d 775 (1957).

14 Crowell v. Housing Authority, 483 S.W.2d 864, 866 (Tex. Civ. App.— Tyler 1972, writ granted).

15 *Id.* at 866, 867; Housing Authority v. Morris, 14 So. 2d 527 (Ala. 1943); Manius v. Housing Authority, 39 A.2d 614 (Pa. 1944).

16 14 So. 2d 527 (Ala. 1943).

therefore refused to allow the authority to escape a duty imposed by law.[17]

After approving the general rule upholding exculpatory clauses in private lease agreements, the court in *Crowell* adopted the decision in *Manius v. Housing Authority*[18] which allowed a public housing authority to contract for non-liability.[19] The decision in *Crowell* was based on the court's interpretation of article 1269k, sections 8 and 9.[20]

Section 8 grants the housing authority all the powers necessary or convenient to carry out the purposes of the act including the power to make and execute contracts necessary to the exercise of the powers of the authority.[21] The act further provides:

> It is hereby declared to be the policy of this State that each Housing Authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates *consistent with its providing decent, safe and sanitary dwelling accommodations* . . . .[22]

The court in *Crowell* then concluded that "[t]he Housing Authority is not a public utility or a common carrier or a municipality whose business is affected with a public interest and whose service many times must be used exclusively by the public."[23] The court's conclusion is based on the belief that a strict construction of sections 8 and 9 of article 1269k manifests an intention by the legislature to allow the authority to contract in an exculpatory manner.[24]

In reaching this result, the court necessarily placed more emphasis on its interpretation of section 8 which grants the authority to contract, than on section 9 which expresses the purpose of the Authority to provide decent safe and sanitary low-rent housing.[25] The court's construction of these two sections merits a critical analysis of the law and

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17 *Id.* at 530-31.

18 39 A.2d 614 (Pa. 1944).

19 Crowell v. Housing Authority, 483 S.W.2d 864, 867 (Tex. Civ. App.—Tyler 1972, writ granted).

20 *Id.* at 867; *see* TEX. REV. CIV. STAT. ANN. art. 1269k, §§ 8, 9 (1963).

21 TEX. REV. CIV. STAT. ANN. art. 1269k, § 8 (1963).

22 *Id.* § 9 (emphasis added); *see* Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79 (1940).

23 Crowell v. Housing Authority, 483 S.W.2d 846, 867 (Tex. Civ. App.—Tyler 1972, writ granted); *accord*, Philippine Airlines, Inc. v. Texas Eng'r & Mfg. Co., 181 F.2d 923 (5th Cir. 1950); Lone Star Gas Co. v. Veal, 378 S.W.2d 89 (Tex. Civ. App.—Eastland 1964, writ ref'd).

24 Crowell v. Housing Authority, 483 S.W.2d 846, 867 (Tex. Civ. App.—Tyler 1972, writ granted).

25 *See generally* TEX. REV. CIV. STAT. ANN. art. 1269k, §§ 8, 9; Crowell v. Housing Authority, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted).

the purpose for which the Authority was created, especially in a case of first impression in Texas.

Most courts which have declared exculpatory clauses invalid "have done so on the strength of specific legislation, such as public housing codes, which place affirmative public duties upon landlords."[26] Generally, it has been held that a person may not contract against liability in violation of a positive duty imposed by law as expressed by statute.[27] The Texas Supreme Court interpreted article 1269k as follows:

> A reading of both the Federal and Texas acts demonstrates that the purposes sought are the elimination of slum conditions and the providing of *safe and sanitary* dwelling accommodations for persons of low income.[28]

This interpretation of the article's purpose indicates the supreme court places an emphasis on section 9 which was absent in the court of civil appeals decision in *Crowell*.[29]

In *Manius*, the Pennsylvania Supreme Court, in a very brief opinion, superficially discussed the legislative intent and purpose of the housing authority.[30] The court failed to mention the purpose of the Authority to provide safe housing for persons of low income, but simply concluded that the purpose which created the housing authority would not justify the imposition of a restriction upon its power to contract.[31] In adopting this reasoning and rejecting that given in *Morris*, the court in *Crowell* chose to cite only one principle presented in the opinion.

> [A]greements exempting persons from liability for negligence induces a want of care, and it is a good doctrine that no person may contract against his own negligence and that it is applicable to the authority engaged in a public service, and that public policy forbids that they contract for immunity for their negligence.[32]

This principle was used only in support of the *Morris* opinion, but it

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26 McCutcheon v. United Homes Corp., 469 P.2d 997, 998 (Wash. Ct. App. 1970); *accord*, Housing Authority v. Morris, 14 So. 2d 527, 530-31 (Ala. 1943); Cerny Pickas & Co. v. C.R. Jahn Co., 106 N.E.2d 828, 832 (Ill. Ct. App. 1952); *cf.* Kuzmiak v. Brookchester, 111 A.2d 425, 431 (N.J. Super. Ct. 1955); Thomas v. Housing Authority, 426 P.2d 836 (Wash. 1967); *see* 17 C.J.S. *Contracts* § 262, at 1162 (1963).

27 17 C.J.S. *Contracts* § 262, at 1162 (1963); *see* Tenants Council v. De Franceaux, 305 F. Supp. 560, 563 (D.D.C. 1969); Hunter v. American Rentals, Inc., 371 P.2d 131, 133-34 (Kan. 1962); Bell v. McAnulty, 37 A.2d 543, 544 (Pa. 1944).

28 Housing Authority v. Higginbotham, 135 Tex. 158, 164, 143 S.W.2d 79, 83 (1940) (emphasis added).

29 *See generally* Crowell v. Housing Authority, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted).

30 Manius v. Housing Authority, 39 A.2d 614 (Pa. 1944).

31 *Id.*

32 Crowell v. Housing Authority, 483 S.W.2d 864, 867 (Tex. Civ. App.—Tyler 1972, writ granted).

was not used as the major premise for the conclusion reached.[33] The court in *Crowell*, however, refused to follow the argument in *Morris* that exculpatory clauses induce a want of care. As a result, the entire holding of *Morris* was rejected.[34]

In *Morris*, the Alabama court refused to make the superficial examination of the statute made in *Manius*. Instead, it looked to the nature, purpose, powers, authorities and legislation which brought the housing authority into being in determining the controlling issues.[35] In doing so, the court determined that the purpose and intent of the legislature in creating the public housing authority was expressed in the "Housing Authority Law," and concluded that there was no authority in the act "that authorizes it to provide . . . for such immunity."[36] "The express authority in the act of its creation subjecting it to be sued generally indicates a legislative intent to the contrary."[37]

Appellee housing authority in *Crowell* also argued that to hold exculpatory clauses void as against public policy would infringe on the parties' right of freedom to contract.[38] *Thomas v. Housing Authority*[39] is a case in which the Supreme Court of Washington lends support to the appellants' position. The court in *Thomas* also cited both the *Manius* and *Morris* decisions, but, unlike *Crowell*, followed the decision given in *Morris* as being "better and more carefully reasoned than in *Manius*."[40] In discussing the respective parties' right of freedom to contract the *Thomas* opinion recognized another basis for holding such a clause invalid—the unequal bargaining power between the landlord and tenant in a lease agreement provided by the public housing authority.[41] It has been argued that the freedom of choice and freedom of contract is considerably less than free in a landlord-tenant relationship. The policy which favors freedom of contract is based on an implication that the contracting parties have a freedom of choice.[42] Freedom of

33 Housing Authority v. Morris, 14 So. 2d 527 (Ala. 1943); Thomas v. Housing Authority, 426 P.2d 836 (Wash. 1967).

34 Crowell v. Housing Authority, 483 S.W.2d 864, 867 (Tex. Civ. App.—Tyler 1972, writ granted).

35 Housing Authority v. Morris, 14 So. 2d 527, 530 (Ala. 1943).

36 *Id.* at 531.

37 *Id.* at 531.

38 Crowell v. Housing Authority, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted).

39 426 P.2d 836 (Wash. 1967).

40 *Id.* at 843. In its decision the court stated:

> From this expression of the legislature, the conclusion is inescapable that two of the primary objectives in creating public housing authorities . . . are: (1) to provide safe and sanitary housing, and (2) to make such housing available to persons of low income who otherwise would be forced to reside in unsanitary and unsafe housing.

*Id.* at 842.

41 Thomas v. Housing Authority, 426 P.2d 836, 842 (Wash. 1967).

42 Comment, *The Effect of Exculpatory Agreements Upon Landlords' Tort Liability In Illinois*, 54 NW. U.L. REV. 61, 69 (1959); *see* Kay v. Cain, 154 F.2d 305, 306 (D.C. Cir. 1946). The court here stated:

contract can be, and has been, limited where the bargaining positions of the parties might conflict with a dominant public interest.[43]

Citing Dean Prosser, the court in *Thomas* felt the way the appellants had to sign the authority's standard lease form on a "take it or leave it" basis was an obvious disparity in bargaining power and if allowed to include an exculpatory clause would have the effect of "putting the tenants at the mercy of the defendant housing authority's negligence."[44] "This would be contrary to the public policy inherent in the basic legislation and authorization relative to low rent public housing."[45]

Cases which have cited *Thomas* in their opinions, but have refused to follow its decision, can be distinguished by the character and relationship of the parties. They do not deal with a landlord which has a duty imposed by statute to provide for safe housing as in *Thomas*.[46] It can be inferred from these cases that the courts have restricted the *Thomas* decision to cases where duties have been imposed by statute.

The statutes dealt with in *Thomas* and *Morris* are very similar in nature to that found in Texas—article 1269k.[47] There are no specific sections within the Texas statute which authorize a public housing authority to exempt itself from the liability of its own negligence.[48] It is true, however, that section 8(a) authorizes the authority ". . . to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority. . . ."[49]

When a thorough analysis is made concerning the nature, powers, and purpose behind the creation of the public housing authority, the argument that the intent of the Texas Legislature was to impose a public duty upon the authority to provide safe and sanitary low-rent housing is well founded. When that purpose is applied to the general rule which forbids a person to contract away a duty imposed by law, it suggests that the decision handed down by the Texas court of civil appeals in *Crowell* was based on a misinterpretation of article 1269k as allowing the public housing authority an unlimited right to contract.

The Texas Supreme Court has already declared that the purpose of

> [I]t is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid. The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy.

43 Comment, *The Effect of Exculpatory Agreements Upon Landlords' Tort Liability In Illinois*, 54 NW. U.L. REV. 61, 66 (1959).

44 Thomas v. Housing Authority, 426 P.2d 836, 842 (Wash. 1967).

45 *Id.* at 842.

46 McCutcheon v. United Homes Corp., 469 P.2d 997, 999 (Wash. Ct. App. 1970); *see* Feldman v. Stein Bldg. & Lumber Co., 148 N.W.2d 544 (Mich. Ct. App. 1967); Kuzmiak v. Brookchester, Inc., 111 A.2d 425 (N.J. Super. Ct. 1955).

47 TEX. REV. CIV. STAT. ANN. art. 1269k (1963); *see* ALA. CODE tit. 25, §§ 6, 12 (1958); WASH. REV. CODE ANN. §§ 35.82.010, 35.82.020 (1965).

48 TEX. REV. CIV. STAT. ANN. art. 1269k (1963).

49 *Id.* § 8(a).